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No. 91-45

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM 1991

ROBERT M. GIRARD AND THOMAS J. DEEF,

*Petitioners,*

v.

AGRICULTURAL STABILIZATION AND CONSERVATION SERVICE, UNITED STATES DEPARTMENT OF AGRICULTURE; COMMODITY CREDIT CORPORATION,

*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## REPLY OF PETITIONERS TO BRIEF FOR RESPONDENTS IN OPPOSITION

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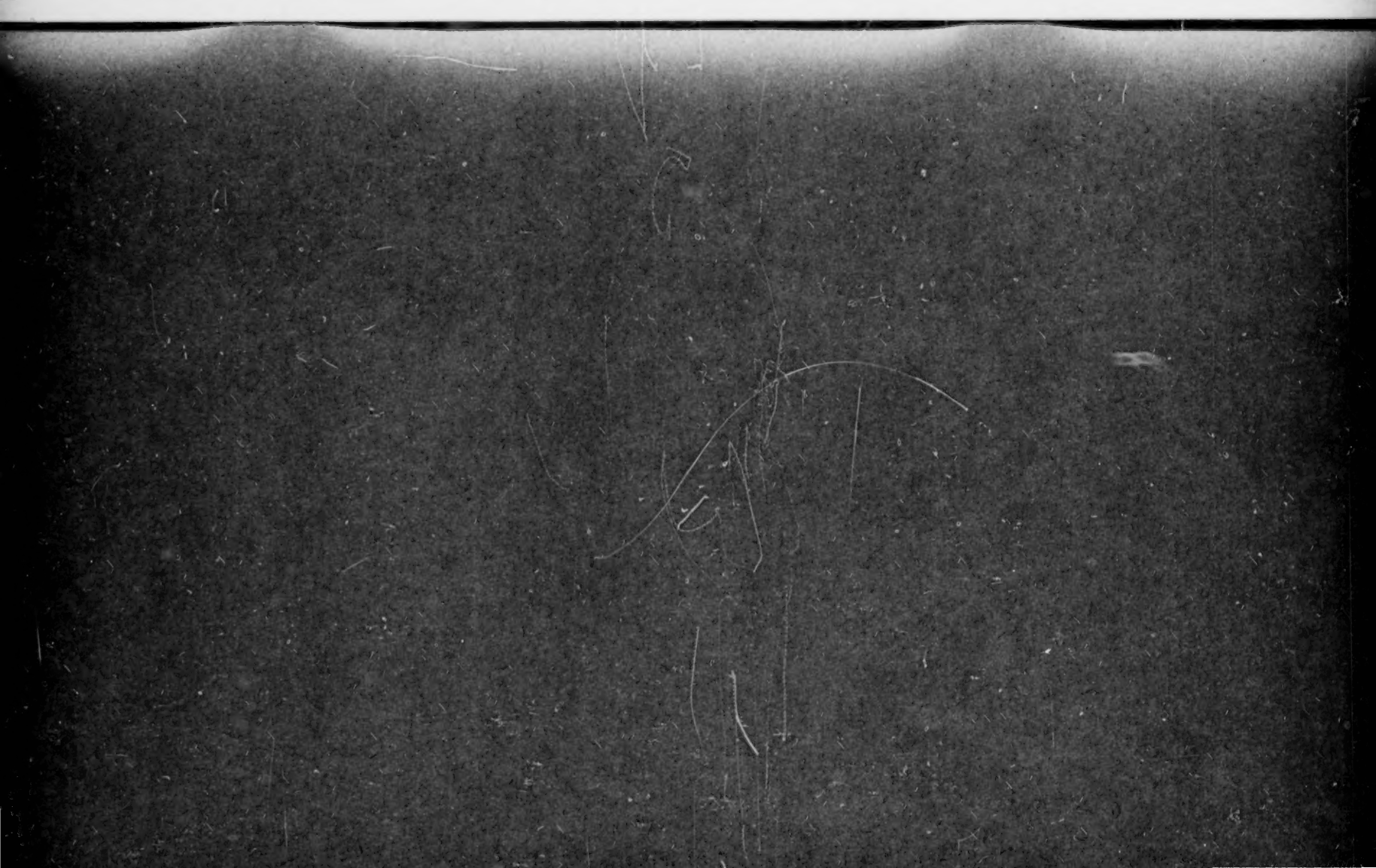

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## REPLY OF PETITIONERS TO BRIEF FOR RESPONDENTS IN OPPOSITION

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## ARGUMENT

1. Petitioners contend that in cases of adjudication required by the Due Process Clause to be determined "on the record" after opportunity for an agency hearing, § 554 of the APA applies and requires an internal separation of functions between employees who hear and decide and those who investigate and initiate prosecution. The Brief for the Respondent in Opposition ("Resp. Br.") asserts "[t]hat contention merits no further review", Resp. Br. at 4, because "[t]he Due Process Clause does not require strict separation of adjudicative and investigatory functions." *Ibid.*

The question presented by the Petition "is not constitutionality [of the FAR debarment procedures], but rather whether there is any good reason to doubt that the APA [as applied by this Court] means what it says." *Bowen v. Georgetown University Hospital,* 488 U.S. 204, 223 (1988) (Scalia J., concurring). Hence, cases such as *Withrow v. Larkin,* 421 U.S. 35 (1975), on which the Government relies, (Resp. Br. 4) are simply inapposite. Moreover, while the Court held in *Withrow* that the combination of investigative and adjudicative functions in Wisconsin's medical licensing board did not constitute a due process violation, what the Government fails to discern is the fundamental distinction, recognized in *Withrow,*[1] between combining functions in an agency

[1] Justice White's opinion for the Court noted "that an agency employee performed the actual investigation and gathering of evidence in this case and that an assistant attorney general then presented the evidence to the Board at the investigative hearings. While not essential to our decision upholding the constitutionality of the Board's sequence of functions, these facts . . . show that the Board had organized itself internally to minimize the risks arising from combining investigation and adjudication. . . ." 421 U.S. at 54, n. 20.

decision-maker and permitting the *same individual* to investigate, charge and finally adjudicate the charges produced by his investigation as in this case. Pet. App. 9a.[2]

Though *Withrow* held that procedural due process was not violated when the same agency makes the initial charge or determination of probable cause and also the ultimate adjudication, the Court distinguished and noted its disapproval in prior cases of an adjudicatory process which combined the role of investigator, prosecutor and decision-maker in the same person.

> Quite apart from precedents and considerations concerning the constitutionality of a combination of functions in one agency, the District Court rested its decision upon *Gagnon v. Scarpelli*, 411 U.S. 778 (1983), and *Morrissey v. Brewer*, 408 U.S. 471 (1972). These decisions, however, pose a very different question. Each held that when review of an initial decision is mandated, the decision-maker must be other than the one who made the decision under review. . . . Allowing a decision-maker to review and evaluate his own prior decisions raises problems that are not present here. . . .

421 U.S. at 58, n. 25.

The Government's reliance on *Richardson v. Perales*, 421 U.S. 389 (1971) and *FTC v. Cement Institute*, 333 U.S. 683 (1948) (Resp. Br. 5) is inexplicable. Neither case addressed the APA issue raised by the Petition nor involved an adju-

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[2] While Klopfenstein's resignation removes him as the debarring officer, there is no reason to assume, as the Government does, (Resp. Br. n.2) that another ASCS employee who participated in the investigation will not serve as the debarring officer. The FAR procedures simply fail to provide the protections required by § 554(c) and (d) of the APA.

dicatory process which combined in a single person the incompatible functions of investigating and judging. Moreover, the Social Security Administration's adjudicative hearings for deciding disability claims, involved in *Perales*, are conducted before an administrative law judge under a procedure which "does not vary from that prescribed by the APA. Indeed, the latter is modelled upon the Social Security Act." 402 U.S. at 409. See *Matthews v. Eldridge*, 424 U.S. 319, 335-339 (1976). That's all that the petitioners here seek.[3]

*Transco Security, Inc. v. Freeman*, 639 F.2d 318 (6th Cir.), *cert. denied*, 454 U.S. 820 (1981) and *ATL, Inc. v. United States*, 736 F.2d 677 (Fed. Cir. 1984) (Resp. Br. 5) are similarly inapt. Neither case raised the Petition's APA question. In *ATL*, the Navy's debarment regulations afforded the contractor "a triple-layer review process" (736 F.2d at 687) which insured a separation of functions between the official who initiated the suspension process and the three-member Navy Debarment Committee which conducted the hearing and submitted its findings for final action to a higher official. *Ibid.*

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[3] The SSA's multi-step initial determination and administrative review process for handling disability claims (20 C.F.R. §§ 404.900-404.982) bears no resemblance to FAR's single step debarment process which confers on the "debarring official" final authority to "debar a contractor for any of the causes in 9.406-2. . . ." 48 C.F.R. § 9.406-1(a); Pet. App. 3a. The debarred contractor's sole remedy, deprived of a formal hearing pursuant to §§ 556 and 557 of the APA, is to seek judicial review under the narrow "arbitrary and capricious" standard of § 706(2)(A) of the APA, rather than the "more generous" scope of review provided by the "substantial evidence" test under § 706(2)(E) which is limited to cases based on a formal hearing record. *Camp v. Pitts*, 411 U.S. 138, 141-142 (1973); *Abbott Laboratories, Inc. v. Gardner*, 387 U.S. 136, 143 (1967). See *Association of Data Processing Service Organizations, Inc. v. Board of Governors*, 745 F.2d 677, 684 (D.C. Cir. 1984).

2. The Government contends that petitioners are not entitled to invoke the separation of functions protections of § 554 of the APA[4] because that section applies only to adjudicatory hearings "required by statute to be determined on the record", 5 U.S.C. 554(a), and "[d]ebarment hearings are not 'required by statute' [but] [i]nstead, the right to a hearing . . . and the procedures . . . are established by a Federal Acquisition Regulation." Resp. Br. 5-6. The Government characterizes petitioners' reliance on *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950) to support applicability of § 554 of the APA to this case as a "novel proposition" which, if accepted, "would invalidate a . . . variety of informal . . . 'truncated' hearings that meet the requirements of due process." Resp. Br. 6.

a. Petitioners are threatened with debarment and loss of employment on the basis of charges that they engaged in conduct "which indicates a serious lack of business integrity or business honesty." Pet. App. 32a. They requested a formal hearing to dispute the charge (*id.* 36a) because petitioners' "good name, reputation, honor, or integrity is at stake". *Goss v. Lopez*, 419 U.S. 565, 574 (1971) (quoting *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971); see also, *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972).

The Government has failed to cite a single case involving a liberty or property interest protected by the Due Process Clause in which this Court has upheld against a due process challenge an adjudicatory hearing procedure involving disputed adjudicative facts in which the incompatible functions

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[4] 5 U.S.C. § 554(d) provides that an agency employee who "engaged in the performance of investigative or prosecutory functions . . . may not in that or a factually related case, participate or advise in the decision . . . except as witness or counsel. . . ."

of investigating and judging were combined in a single person. The Government's facile dismissal as a "novel proposition" of petitioners' reliance on *Wong Yang Sung's* holding that "required by statute" includes what is required by due process (Resp. Br. 6) overlooks or ignores the fact that the holding of the 1950 case was twice reaffirmed by this Court the following year.[5]

b. Equally groundless is the Government's argument that acceptance of petitioner's "novel proposition" would invalidate a wide variety of informal adjudicatory arrangements by federal agencies . . . short of a full trial type hearing" (Resp. Br. 6) which this Court has upheld as satisfying the requirements of due process. *Ibid.*

First, this Court has never held that the Government may deprive a person of a substantial liberty or property interest by "informal procedures short of a full trial type hearing" (Resp. Br. 6) where there is a dispute about critical facts on which the Government's case is based and the investigator and final decision maker is the same person. There is nothing novel about the proposition that where an agency's decision turns on questions of fact, a person threatened with the stigma of governmental defamation or deprivation of sub-

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[5] In *Riss & Co. v. United States*, 341 U.S. 907 (1951) this Court reversed *per curiam*, on the basis of *Wong Yang Sung*, the lower court's refusal to apply the holding of that case to require a formal hearing prior to denial of a certificate of authority by the I.C.C. See, 96 F. Supp. 452, 454-455. In *Cates v. Haderlein*, 189 F.2d 369 (7th Cir. 1951) the court held that *Wong Yang Sung* did not require the Postmaster General to hold a formal adjudicatory hearing prior to issuance of a fraud order because "[t]he terms of the statute under which the Fraud Order . . . was issued make no provision for a hearing. . . ." *Id.* at 371. This Court reversed *per curiam* on the basis of *Wong Yang Sung*. *Cates v. Haderlein*, 342 U.S. 804 (1951).

stantial rights is entitled, as matter of due process, to an "on the record" hearing before an "impartial decision maker." *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970). See *I.C.C. v. Louisville & N.R. Co.*, 227 U.S. 88, 93-94 (1913); *Willner v. Committee on Character & Fitness*, 373 U.S. 96, 103-104 (1963); 2 K. Davis, *Administrative Law Treatise*, § 12.10 at 448-449 (2d ed. 1979) ("A party whose interest is protected by due process is entitled to opportunity for a trial type hearing on disputed adjudicative facts); see *Id.* § 12:10 at 448-449.

Second, a "wide variety of informal adjudicatory arrangements" (Resp. Br. 6) involve proceedings in which no "on the record" hearing is required either because there is no genuine dispute about critical facts, or because "the nature of the interest at stake", *Ingraham v. Wright*, 430 U.S. 651, 672 (1977), may be protected against unlawful infringement by "truncated . . . procedures" that satisfy due process, *Goss*, *supra* at 583[6], or the exigencies of the case require prompt but temporary action subject to a later trial-type hearing. See *e.g. Horne v. Laird*, 463 F.2d 1268, 1270-1271 (D.C. Cir. 1972); *cf. Federal Deposit Insurance Corp. v. Mallen*, 486 U.S. 230, 240-241 (1988); 2 K. Davis, *supra* § 11:12 at 388. None of those reasons apply here.

This case merits review to guide the lower federal courts in the exercise of their judgment as to when agency adjudication requires an "on the record" trial type hearing to satisfy the requirements of due process so as to trigger the application of § 554 of the APA.

c. The Government contends that petitioners' reliance on *Wong Yang Sung* to require a hearing under §554 of the APA is misplaced because in that case the requirement for a hearing

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[6] "[A] routine [school] disciplinary measure does not assume constitutional dimensions". *Goss* at 587 (Powell J. dissenting) (temporary suspension).

had been read into the governing deportation statute to save it from invalidity whereas in this case there is no statutory right to a debarment hearing, but only a "right based entirely on a Federal Acquisition Regulation." Resp. Br. 6-7.

That specious argument ignores the fact that "[i]t is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown University Hospital, supra,* 488 U.S. at 208. The debarment procedures at issue here, 48 C.F.R., Subpart 9.4, were adopted pursuant to 41 U.S.. § 405(a) in which Congress directed the Office of Federal Procurement Policy (OFPP) to implement "a single Government-wide procurement regulation called the Federal Acquisition Regulation. . . ." See Petition 6, n. 3. While no statute affords petitioners a right to a debarment hearing, here, as in *Wong Yang Sung*[7], without such a hearing there would be no constitutional authority for debarment. *Transco Security, Inc. v. Freeman, supra,* 639 F.2d at 321; *Gonzalez v. Freeman,* 334 F.2d 570, 578 (D.C. Cir. 1964). *Cf. Federal Deposit Insurance Corp. v. Mallen, supra,* 486 U.S. at 240; *Brock v. Roadway Express, Inc.,* 481 U.S. 252, 260-263 (1987).

One of the "administrative evils" that it was the purpose of the APA to cure was "the practice of embodying in one person or agency the duties of prosecutor and judge." *Wong Yang Sung, supra* at 41. As explained by the Attorney General's Committee on Administrative Procedure

> commingling of functions of investigation or advocacy with the functions of deciding are . . . plainly undesirable.

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[7] "[T]he difficulty with any argument premised on the proposition that the deportation statute does not require a hearing is that, without such a hearing, there would be no constitutional authority for deportation." 339 U.S. at 49.

> But they are . . . avoidable and should be avoided by appropriate internal division of labor. . . . [T]he problem is simply one of isolating those who engage in the activity.

Attorney Gen. Comm. on Administrative Procedure, Final Report 56 (1941), S. Doc. No. 8, 77th Cong., 1st Sess. 56 (1941). Section 554 of the APA achieves that purpose by requiring that "hearings be conducted by hearing officers who have not received or obtained factual information outside the record and who are neither supervised nor directed in the conduct of the hearing by agency officials engaged in the performance of investigative or prosecuting functions." Attorney General's Manual on the Administrative Procedure Act (1947) 54. Section 554 is an embodiment of the common law principle that "no man shall be a judge in his own cause." *Bonham's Case* (1610). The FAR debarment procedures, on their face and as applied in this case, ignore that principle and the specific provisions of § 554.

No express debarment statute is required to warrant resort to the remedial purposes of the APA. Indeed, the rule is the other way. The APA applies to every statute enacted thereafter except to the extent that it is modified or superseded by another statute "expressly". 5 U.S.C. § 559. See *Shaughnessy v. Pedreiro*, 349 U.S. 48, 50-51 (1955). Petitioners submit that the FAR debarment procedures which permit the "debarring official . . . authorized to impose debarment", 48 C.F.R. § 9.403, to participate in investigation, as is the case here (Pet. App. 9a), violate one of the fundamental principles of the APA, "the basic structural legislation which" governs federal administrative procedure. *Bowen, supra* 488 U.S. at 216 (Scalia J. concurring).

## CONCLUSION

For the foregoing reasons, this Court should grant certiorari and reverse the judgment of the court of appeals.

Respectfully submitted,

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